THE BOTTOM LINE

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OFFICIAL PUBLICATION OF THE STATE BAR OF CALIFORNIA LAW PRACTICE MANAGEMENT AND TECHNOLOGY SECTION

SPECIAL ISSUE
SIX ARTICLES FOR MCLE CREDIT

Ernest Schaal

MCLE BIAS

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THE STATE BAR'S ROLE AND ELIMINATION OF BIAS IN THE LEGAL PROFESSION

By Ernest Schaal

This article is designed to satisfy your one-hour MCLE requirement for elimination of bias in the legal profession based on any of, but not limited to, the following characteristics: sex, color, race, religion, ancestry, national origin, blindness or other physical disability, age, and sexual orientation (See MCLE Rule 2.1.3). The focus will be what the State of California is doing to eliminate such bias.

First off, it is important to realize that the topic of elimination of bias in the legal profession is a much narrower topic than may be assumed. According to the guidelines issued by the State Bar, elimination of bias in the legal profession does not cover bias generally. An activity that focuses on bias among attorneys, or on bias found in the courtroom, counts for MCLE bias credit. Activities addressing societal bias, the ADA laws, diversity in the workplace, and how to handle a sexual harassment case do not count for MCLE bias credit.

Using this narrow definition, I was surprised how little about this subject was on the State Bar Web site. That Web site had a lot of information on diversity in the workplace but almost nothing on elimination of bias in the legal profession, except for dealing with the one hour MCLE requirement. More troubling, an analysis of the State Bar of California structure shows that it is unclear who has the task of eliminating such bias.

Reviewing the resources on Rules of Professional Conduct, I found only one rule that specifically applied. That was Rule 2-400 (Prohibited Discriminatory Conduct in a Law Practice). That rule states that in the management or operation of a law practice, a member shall not unlawfully discriminate

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FREE MCLE FOR LPMT MEMBERS!

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FROM THE CHAIR

Robert Kohn

Dear Section Members:

In this month's Bottom Line, we devote the entire newsletter to Hard to Get MCLE credits in Ethics, Substance Abuse and Elimination of Bias. So, if you have not yet gotten your credits in these areas, please read the following articles and submit your written tests.

This is my last letter to the members as Chair of the Law Practice Management and technology section. In September, at the annual convention, the mantel of leadership passes to Carole Levitt. I know she will do a great job.

As immediate past Chair, I will continue for a year as an advisor to the committee. I look forward to assisting Carole in this role.

I just want to say that I have really enjoyed being the Chair of this Section. I value the new relationships that I have made, and everything that I have learned in working with the California Bar. It has been a great experience and I recommend that anyone interested in improving their careers, and in meeting valuable contacts, take an active leadership role in the bar.

Thank you for the opportunity to serve as Chair.

Sincerely,

Robert N. Kohn, Chair
Law Practice Management and
Technology Section
State Bar of California

or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in two types of activities. One type is determining the conditions of employment (hiring, promoting, discharging, etc.). The other type is accepting or terminating representation of any client.

Although the language is slightly different, both MCLE Rule 2.1.3 and Rule 2-400 of Professional Conduct cover the same type of characteristics to be protected from bias or discrimination. On the other hand, there is a big difference between the scope of the two rules. According to the guidelines issued by the State Bar for MCLE Rule 2.1.3, that rule focuses generally on bias among attorneys and on bias found in the courtroom, but Rule 2-400 only prohibits discrimination in the conditions of employment or in accepting or terminating representation of a client. Also, Rule 2-400 only prohibits discrimination that is "unlawful." That term ("unlawful") is determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.

According to Section (C) of Rule 2-400, the State Bar cannot initiate a disciplinary investigation or proceeding against a member under that rule unless some other tribunal of competent jurisdiction, not a disciplinary tribunal, has first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Even then, in order for discipline to be imposed under this rule, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

In other words, if bias in the legal profession doesn't rise to the level of being unlawful under state or federal law, then there is nothing to prevent such bias under Rule 2-400.

Although there are other rules that apply, in addition to the Rules of Professional Conduct, such as the 2002 California Rules of Court, they don't seem to limit the conduct of general lawyers.

Rule 989.2 (Non-discrimination in court appointments) of the 2002 California Rules of Court states that it shall be the policy of each court to select attorneys, arbitrators, mediators, referees, masters, receiv-ers, and other persons appointed by the court on the basis of merit. No court shall discriminate in such selection on the basis of gender, race, ethnicity, disability, sexual orientation, or age.

Section 1.6. of the 2002 California Rules of Court (Selection of members of court-related committees) states that a court that selects members to serve on court-related committees should establish procedures ensuring that all qualified persons have equal access to selection regardless of gender, race, ethnicity, disability, sexual orientation, or age.

IF BIAS IN THE LEGAL PROFESSION DOESN'T RISE TO THE LEVEL OF BEING UNLAWFUL UNDER STATE OR FEDERAL LAW, THEN THERE IS NOTHING TO PREVENT SUCH BIAS UNDER RULE 2-400.

Note that the language of MCLE Rule 2.1.3, the Rules of Professional Conduct, and the 2003 California Rules of Court do not use the same language in discussing the protected classes. This causes an anomaly, in that the California Rules of Court seem to permit selection based upon religious beliefs, since religion is not mentioned in the rule, but the MCLE Rule 2.1.3 and the Rules of Professional Conduct do not permit selections based upon religious beliefs.

Looking at the structure of the State Bar of California, the goal of eliminating bias in the legal profession doesn't seem to have a home. Among the standing committees of the Bar, there are a few standing committees that sound promising, but none of them have the task of eliminating bias.

There are standing committees on ethnic minority relations, legal professionals with disabilities, sexual orientation and gender identity discrimination, and women in the law. Their tasks are listed on the bar Web site as being the same: increasing participation in the administration and governance of the State Bar's programs and

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QUESTIONS: ELIMINATION OF BIAS IN THE LEGAL PROFESSION

MCLE BIAS

1. Activities addressing bias among attorneys count for MCLE elimination of bias in the legal profession credit.
True **False**

2. Activities addressing societal bias count for MCLE elimination of bias in the legal profession credit.
True **False**

3. Activities addressing the ADA laws count for MCLE elimination of bias in the legal profession credit.
True **False**

4. Activities addressing diversity in the workplace count for MCLE elimination of bias in the legal profession credit.
True **False**

5. Activities addressing how to handle a sexual harassment case count for MCLE elimination of bias in the legal profession credit.
True **False**

6. Activities addressing bias found in the courtroom count for MCLE elimination of bias in the legal profession credit.
True **False**

7. The State Bar of California has a wealth of information on their Web site on elimination of bias in the legal profession.
True **False**

8. The Rules of Professional Conduct prohibit any type of discrimination based upon race, national origin, sex, sexual orientation, religion, age or disability.
True **False**

9. It is against the Rules of Professional Conduct to unlawfully discriminate against someone because of their age in determining whether to accept a client.
True **False**

10. The term "unlawful discrimination" is explicitly defined within the Rules of Professional Conduct.
True **False**

11. On its own, the State Bar can initiate a disciplinary investigation under Rule 2-400, based solely on a complaint of discrimination.
True **False**

12. A disciplinary tribunal can be the tribunal of competent jurisdiction that determines if an act is an unlawful discrimination under Rule 2-400.
True **False**

13. An order for discipline can be imposed under Rule 2-400 as soon as a finding of unlawfulness has been made.
True **False**

14. The term "unlawful" used in a disciplinary proceeding can be broader than that under state or federal law.
True **False**

15. A court, in selecting attorneys, arbitrators, mediators, referees, masters, receivers, and other persons appointed by the court, shall not discriminate in such selection on the basis of gender, race, ethnicity, disability, sexual orientation, or age.
True **False**

16. A court, in selecting members to serve on court-related committees, shall not discriminate in such selection on the basis of gender, race, ethnicity, disability, sexual orientation, or age.
True **False**

17. The various rules of the Court and the Bar, relating to bias, fail to use the same language in describing areas upon which selection cannot be based.
True **False**

18. The standing committee on sexual orientation and gender identity discrimination has, as its main task, eliminating bias in the legal profession.
True **False**

19. There is a special committee of the State Bar specifically addressing elimination of bias in the legal profession.
True **False**

20. A review of the State Bars section executive committees, special committees, boards, and commissions, and entities, finds that none of them seem to address the problem of elimination of bias in the legal profession.
True **False**

SUBSTANCE ABUSE
GETTING HOOKED AND GETTING FREE

By Carol Williard

Carol Williard

MCLE
SUBSTANCE ABUSE

After reading this article, you can earn MCLE credit by completing the test on page 7

Statistics are staggering. Last month eleven million people abused alcohol in the U.S.; ten million, marijuana; one and a half million, cocaine; and sixty-one million, nicotine. How do people get hooked?

Scientifically, once a drug is taken it sets off a neurological chain reaction in the brain elevating the level of dopamine. Dopamine is believed to be the keystone molecule of addiction, directly responsible for the exhilarating rush that reinforces the desire to take drugs. With each use, circuits are etched in the brain that trigger thoughts and motivate actions. Over time, the *need* for the pleasant experience in the brain circuits becomes a *phenomenon of craving* that overtakes the addict's life.

An addict differs bodily from a moderate user in that the substance causes an *allergic reaction* in the body, (a hypersensitivity or increased susceptibility), which in turn causes an uncontrollable *obsession* for that substance. An addict seeks the drug to the exclusion of all else, including family, job, and health, merely to feel "normal" again. "Normal" becomes having that experience of the dopamine high.

Do all people get addicted? Obviously no. But be warned. These substances produce elevated levels of dopamine in all people. Thinking, "it won't happen to me" is what every alcoholic or addict believes while on his way into the insanity of addiction. Most substance abusers believe that even though they see the danger signs of addiction, *their case is different* for one reason or another.

Substance abuse thus becomes a disease of perception, separating the abuser from the reality that he is loosing the *ability* to control his use. When rationalizations set in, justifications arise. Bewildered by others' responses to his drinking or using, the abuser can neither comprehend the insanity of his destructive thoughts and behaviors nor see his participation in the downward spiral of his life. The drug is viewed as his *solution,* not his problem.

As the disease progresses, overriding personality characteristics arise. An alcoholic/addict is often jokingly referred to as an egomaniac with an inferiority complex. Possibly because the need for immediate gratification is the overriding pre-occupation, addicts have poor impulse control, and are often extremely demanding. Addicts are plagued with grandiosity. Extreme emotional swings range from rage and hatred at one moment to self-loathing and shame the next. Underneath the bravado, the abuser is plagued with self-centered fear and hopelessness over his inability to pull it together. As the Big Book of Alcoholics Anonymous, the Twelve-Step cornerstone of all credible treatment programs, puts it, he is "restless, irritable, and discontent."

In spite of appearances, substance abuse is not a moral issue. Addicts are not *bad* people; they are physically, mentally, and psychologically *sick.* The disease concept is appropriate because an addict's condition will only get worse if left untreated, often proving fatal. While there is no cure, the problem can be arrested through treatment. But until the addict is willing to be helped, the addict forfeits health, important relationships, dignity, self-esteem, and even life itself. As the disease progresses, entire family units are affected with the inevitable dysfunctional drama that ensues as the problem worsens and the family re-groups.

Chemical dependents are *unable* to stop. No amount of willpower is going to help

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What then is the answer?

Each addict must "hit bottom," (or have that pitiful, demoralizing experience in which he reaches the state of hopelessness over the reality that he will perish without help). "God help me," is truly the beginning prayer for recovery. The enormity and urgency of this crisis overrides an addict's denial system finally enabling him to comprehend the gravity of his situation. Only then does he seize his recovery with the necessary fervor to produce a dramatic change in attitude.

Statistics support that the only lasting solution to addiction is a *spiritual solution.* In all Twelve Step recovery programs, a spiritual solution (not necessarily a religious one) is encouraged, permitting the addict to connect to a God of *his own understanding*. The importance is not *what* the addict believes, but *that* he believes.

AN ADDICT DIFFERS BODILY FROM A MODERATE USER IN THAT THE SUBSTANCE CAUSES AN ALLERGIC REACTION IN THE BODY, (A HYPERSENSITIVITY OR INCREASED SUSCEPTIBILITY), WHICH IN TURN CAUSES AN UNCONTROLLABLE OBSESSION FOR THAT SUBSTANCE.

The recovering addict needs to come to terms with his *powerlessness* over his drug and the *unmanageability* of his life as the result of his using. At first, every recovering addict wants to believe that he can be restored to moderate, responsible use. This is, in fact, not possible. Ironically, it is the admission and acceptance of powerlessness over the substance that allows the addict to regain control over his life. This is the first of the Twelve Steps. The admission of powerlessness leads to the *willingness* to do whatever it takes to achieve complete abstinence.

This willingness, essential to recovery, is not willpower. Rather than being a matter of control through one's will, it is a matter of *giving up* the control of one's will in service to a Power greater than oneself. This is known as *surrendering* to a Higher Power.

The Twelve-Step Fellowship helps the addict see he is not alone and is in a safe place. The Twelve Steps assist the addict in taking responsibility for his actions, both present and past.

Recovery encompasses freedom from frozen, negative thought and behavior patterns, permitting life's challenges to be squarely met. Once abstinent for a while, the addict experiences times when he is not preoccupied with himself and a newfound peace begins to take hold. He experiences a new feeling of serenity, a by-product of the grounded recovery surrounding Twelve Step meetings. Transformation occurs when self-centered fear gives way to faith. A sense of freedom is borne out of taking the necessary action to turn his life around. The faith of a recovering addict is intensely practical. Having been to hell, he well knows the power of his personal God to overcome any seemingly insurmountable problem.

Ironically, there is much laughter in Twelve Step recovery rooms. It is the laughter of recognition of one's distorted thinking, the humor of recognizing the insanity of one's own behavior, and the inherent gratitude of no longer being enslaved. "Whew! Thank God, I don't have to do that anymore!" This laughter becomes a magic elixir, turning despair to hope, sadness to gratitude and anger to peace. The addict transforms the squandering of his life to living a purposeful one. He finally has learned the riddle; he has learned to surrender to win!

Carol Williard is a UCLA-trained substance abuse counselor, and creator and owner of ***New Choice Programs for Stopping Smoking****. Among her many successful* ***New Choice*** *ex-smoking clients are Garry Marshall, Henry Winkler and Ringo Starr. Her corporate clients include National Medical Enterprises, The Federal Aviation Administration, Los Altos Hospital, Winston Tires, and The Santa Monica Police Department. To contact Carol, call New Choice 310-253-9990.*

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QUESTIONS: SUBSTANCE ABUSE

MCLE
SUBSTANCE ABUSE

1. The disease concept is used in defining addiction because the problem is fatal if untreated.
True **False**

2. Part of what causes substance abusers to avoid stopping is they don't believe they can.
True **False**

3. Acceptance of one's powerlessness over substances is, in fact, the essential requirement for recovery.
True **False**

4. Though there is evidence to the contrary, substance abusers really can restore their ability to use responsibly if they will work at it.
True **False**

5. Dopamine is elevated in the brain once a drug is taken.
True **False**

6. To an addict, getting the dopamine rush is considered feeling "normal."
True **False**

7. Substance abuse can be defined as an allergy of the body and an obsession of the mind.
True **False**

8. Total abstinence is only necessary until one can get a "handle" on one's use. Then, the addict can return to responsible use.
True **False**

9. Twelve Step recovery programs are popular because they force the addict to become willing to get help.
True **False**

10. How one surrenders to a Power greater than oneself remains a mystery.
True **False**

11. Most addicts will only look for help at a time of crisis, or having "hit bottom."
True **False**

12. Substance abuse can also be defined as a disease of perception.
True **False**

13. Substance abuse is a family disease.
True **False**

14. There are certain personality characteristics common to addicts.
True **False**

15. Alcoholics can recover purely on human resources if they are diligent.
True **False**

16. Surrendering involves giving up the notion of willpower.
True **False**

17. Self-centered fear is at the core of every abusing person.
True **False**

18. Recovering alcoholics are bad people trying to get good again.
True **False**

19. Recovering addicts need a fundamental shift in attitude.
True **False**

20. Moderate drinkers do not incur the same consequences as described in this article.
True **False**

THE PERILOUS AMBIT OF THE ATTORNEY-CLIENT PRIVILEGE AND RELATIONSHIP

By Craig E. Holden

Craig E. Holden

MCLE ETHICS

After reading this article, you can earn MCLE credit by completing the test on page 14

The process of prospective clients consulting with and considering multiple law firms for potential representation has been characterized as the law firm "beauty contest." But the so-called "beauty contest" can produce ugly results. Beauty contests are particularly common for attorneys competing for major litigation or prized clients. While it may be an honor to be considered for such beauty contests, rainmakers beware: law firm beauty contests are replete with ethical pitfalls.

By consulting with multiple law firms for potential representation, some sophisticated litigants have employed a strategy of attempting to create a conflict of interest and disqualify these law firms from representing their adversaries. Even unsophisticated or good faith prospective clients who share too much confidential information in initial interviews can effectively disqualify a law firm from representing their opposition in the same or substantially related future litigation.

While the prospective client may only meet with you once and never retain you, your firm may still be disqualified because the prospective client now qualifies as a "former client" to whom you owe fiduciary duties. Specifically, your firm may owe the now former client a duty of confidentiality that prevents your representation of adverse parties on related matters.

Adding insult to injury, after losing a beauty contest attorneys may unwittingly find that the disqualification extends to a large host of potentially adverse parties. One court poignantly explained this quagmire: "[h]aving apparently failed the swimsuit competition, [law firms] do not wish to be saddled with the ethical encumbrances of an attorney/client relationship for which it never received any money." *Bridge Products, Inc. v. Quantum Chem. Corp.*, No. 88-C-10734, 1990 WL 70857 (N.D. Ill.).

In California, attorneys are prohibited from undertaking representation in a matter that is adverse to a former client when there is a "substantial relationship" between the current and former matters. This prohibition stems from an attorney's duty to maintain confidential information obtained from a former client. Business & Professions Code § 6068(e) (attorneys must "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her [current or former] client"). An initial consultation with a prospective client (that never retains you) is sufficient to create an attorney-client relationship and make the prospective client a "former client" when confidential information is disclosed.

Evidence Code § 951 broadly defines a "client" as anyone who "consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice...." With this broad definition, virtually every prospective client that consults with you (but never hires you) becomes a former client. Ergo, mere participation in a beauty contest can land the losing law firm a former client and burden the law firm with onerous fiduciary obligations for years to come. *Sullivan v. Sup. Ct.* (Spigola), 29 Cal. App. 3d 64, 69, 105 Cal. Rptr. 241 (1972).

Moreover, the ability of a former client to disqualify their former attorney often yields unfair results — particularly since the passage of time does not cure the conflict. *River West, Inc. v. Nickel,* 188 Cal. App. 3d 1297, 1301-1304 (1987) (attorney disqualified from representing new client in matter "substantially related" to water rights case handled 30 years earlier).

Identifying the Ethical Pitfalls

Naive attorneys who enter beauty contests and receive confidential information can unwittingly be disqualified from representing parties that may not seem adverse. Consider the recent Orange County bankruptcy/securities fiasco which had Wall Street broker-dealers scrambling to interview the best securities and bankruptcy lawyers in town. An invitation to one of these beauty contests could be considered a potentially profitable blessing or a potential curse. One meeting with the wrong Wall Street firm for an initial consultation — coupled with exposure to vast amounts of their confidential information — could easily disqualify your firm from representing the many other brokerage firms that are not currently adverse, but may become adverse as the litigation matures.

In today's competitive legal market, sophisticated litigants and repeat players often consult with and consider dozens of firms for potential representation, especially in high-stakes litigation. Additionally, business clients often hire multiple firms for a single case. In the recent high-profile *MGM v. Sony* litigation concerning the rights to the James Bond trademark, each studio hired four top Los Angeles firms for the single lawsuit. This environment of attorney-shopping and the hiring of teams of law firms creates a fertile field for potential conflicts and future disqualifications for active business developers.

Legal specialists and top-flight litigators are the primary target of the bad faith litigant whose only intention is to limit the adversary's selection of attorneys. Certainly courts recognize that "motions to disqualify are often used as a tactical device" by former clients. *Metro-Goldwyn-Mayer v. Tracinda Corporation*, 36 Cal. App. 4th 1832, 1847 (1995). Nonetheless, courts still mechanically apply the former client conflict rules, often without regard for seemingly unfair results.

For instance, in *Mailer v. Mailer*, 390 Mass. 371, 390, 455 N.E. 2d 1211 (1983), the former prospective client successfully disqualified an attorney he consulted with (for approximately one hour) on only one occasion five years earlier — even though there was no evidence that any confidential information was disclosed to the disqualified attorney.

Similarly, the California Supreme Court found an attorney-client relationship to exist based on a single brief consultation which resulted in no retention of the attorney. *Flatt v. Sup. Ct.* (Daniel), 9 Cal. 4th 275, 280, (1994) ("We have little quarrel [finding that the prospective client became] that of a client," after one hour-long meeting). In contrast, see *Zimmerman v. Zimmerman,* 16 Cal. App. 4th 556 (1993) (attorney's 20 minute conversation with a prospective client was insufficient to prevent the law firm from subsequently representing the other side in the exact same matter).

IN CALIFORNIA, ATTORNEYS ARE PROHIBITED FROM UNDERTAKING REPRESENTATION IN A MATTER THAT IS ADVERSE TO A FORMER CLIENT WHEN THERE IS A "SUBSTANTIAL RELATIONSHIP" BETWEEN THE CURRENT AND FORMER MATTERS.

The inherent flaw with beauty contests is that the initial consultation — in order to be successful — almost always requires that the attorney obtain confidential information from the prospective client. Without this discussion, it is almost impossible for the attorney and prospective client to determine if, and on what terms, representation would be appropriate. *City & County of San Francisco v. Sup. Ct.,* 37 Cal. 2d 227, 235 (1951) (for adequate representation the prospective client should provide "full disclosure of the facts").

For these reasons, the prospective client's initial consultation (which results in no representation) almost invariably transforms the former prospective client into a former client for purposes of the ethical rules. The attorney who was briefly consulted and never hired is now (perhaps unfairly) bound with onerous fiduciary obligations to avoid representing potentially adverse new clients on substantially related matters.

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The Governing Conflict Rules

The primary California statutes governing an attorney's fiduciary obligations to a former client are Rule 3-310(E) of the California Rules of Professional Conduct ("CRPC") and Business & Professions Code § 6068(e). CRPC 3-310(E) provides that "[a] member shall not, without the informed written consent of the . . . former client, accept employment adverse to the . . . former client where, by reason of the representation of the . . . former client, the member obtained confidential information material to the employment." Since "client" can be loosely defined as those who merely "consult" an attorney to consider "retaining," the strictures of the foregoing statutes can easily come into play when attorneys participate in beauty contests.

California courts apply the "substantial relationship test" to determine if a prior representation conflicts with or is adverse to a current representation. *Flatt v. Sup. Ct.*, 9 Cal. 4th 275, 283 (1994). The California Supreme Court explained (in a case involving a motion to disqualify a law firm beauty contestant) the ethical rules relating to the subsequent representation of interests adverse to a former client:

"Where the potential conflict is one that arises from successive representation of clients with potentially adverse interests . . . the chief fiduciary value jeopardized is that of client confidentiality. Thus, where a former client seeks to have a previous attorney disqualified . . . the governing test requires that the client demonstrate a 'substantial relationship' between the subjects of the antecedent and current representations. The 'substantial relationship' test mediates . . . the interest of the former client in ensuring the permanent confidentiality of matters disclosed to the attorney in the course of the prior representation . . . ."Flatt, 9 Cal. 4th at 283.

NAIVE ATTORNEYS WHO ENTER BEAUTY CONTESTS AND RECEIVE CONFIDENTIAL INFORMATION CAN UNWITTINGLY BE DISQUALIFIED FROM REPRESENTING PARTIES THAT MAY NOT SEEM ADVERSE.

Once the former client demonstrates a "substantial relationship" between the two representations, there is a presumption that material confidential information relevant to the second representation was obtained from the former client, and disqualification is therefore mandatory. Once the former client satisfies the substantial relationship test, it does not have to prove that confidential information was actually disclosed in the beauty contest. The attorney is automatically disqualified under the strictures of CRPC 3-310(E) and Bus. & Prof. Code § 6068(e), unless the former client waives the conflict.

In determining whether a substantial relationship exists between a prior consultation and current representation, courts will examine several factors such as: (a) the similarities between the factual and legal questions posed in the two representations; (b) the nature and extent of the attorney's involvement in the prior consultation, including the amount of time spent by the attorney at the prior consultation; and (c) the attorney's exposure to the former client's policy and strategies. Losing beauty contest participants are usually not so lucky in avoiding disqualification from a former client since a "substantial relationship" will naturally exist when a law firm is retained by the former client's adversary in the matter that was the subject of the beauty contest.

When the substantial relationship test is not satisfied, courts have still entertained motions to disqualify attorneys who switch sides after a beauty contest based on the general appearance of impropriety. *B.F. Goodrich Company v. Formosa Plastics Corporation*, 638 F. Supp. 1050 (S.D. Tex. 1986). However, "California has never had a rule requiring that attorneys avoid the appearance of impropriety, and has expressly refused to adopt such a rule." In *re Mortgage & Realty Trust,* 195 B. R. 740 (1996). See also

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MCLE CREDIT

Gregori v. Bank of America, 207 Cal. App. 3d 291, 305-308, (1989) (appearance of impropriety by itself does not compel disqualification, but is a factor).

Recent Court Decisions

Significant spotlight has been placed on two unrelated cases involving motions to disqualify law firms that switched sides after participating in beauty contests — particularly since the facts in both cases are similar, but the outcomes are not. See *Bridge Products, Inc. v. Quantum Chemical Corp.*, No. 88-C-10734, 1990 WL 70857 (N.D. Ill.); and *B.F. Goodrich Company v. Formosa Plastics Corp.*, 638 F. Supp. 1050 (S.D. Tex. 1986).

In *Bridge,* plaintiff Bridge interviewed four Chicago area firms, including Sidley & Austin. Bridge disclosed confidential information to Sidley, including its trial strategy, weaknesses, and bottom-line settlement figures. Bridge ultimately hired another firm. Defendant Quantum, however, ended up hiring Sidley. The court granted Bridge's motion to disqualify Sidley, and admonished Sidley for failing to caution Bridge not to disclose confidential information during the beauty contest. The Bridge court said:

". . . it was Sidley that was responsible for making it clear to Bridge that the initial meeting was purely preliminary and that confidences would not necessarily be protected. . . . Sidley did not have Bridge sign a conflicts waiver . . . [or] indicate whether Bridge would be billed for the meeting; such knowledge would also have made Bridge more wary of making indiscriminate disclosures [of confidential information]."

In *Goodrich,* plaintiff Goodrich moved to disqualify defendant Formosa's attorney, who was one of five that Goodrich had previously consulted, but never retained for its suit against Formosa. Goodrich (like Bridge) shared its trial strategy, and the strengths and weaknesses of its case during the beauty contest. The court, however, strangely denied Goodrich's disqualification motion by finding that the substantial relationship test was not satisfied, even though Formosa's attorney had "switched sides" in the same litigation.

The substantial relationship test would have created a presumption that Goodrich shared confidential information during the beauty contest interview. Having failed to satisfy the substantial relationship test, Goodrich was left with the more onerous burden of proving (which it failed to do) that Formosa's attorneys actually received confidential information. Business developers should not take too much solace in the Goodrich holding, however, since most commentators agree that the Goodrich outcome is the exception, whereas the Bridge holding is the rule.

Avoiding Disqualification

Notwithstanding the plethora of ethical pitfalls facing law firm beauty contestants, there are several prophylactic measures law firms can take to avoid the conflicts of interest that arise. The first line of defense for a law firm takes place before the beauty contest commences.

Law firms should have in place a comprehensive conflicts check system that not only identifies present and former clients, but also identifies individuals and companies that have interviewed (but not retained) the firm for representation. Most law firms lack a conflicts system that identifies the latter.

This definitely creates problems with beauty contests at large firms, since attorneys do not know if their colleagues have ever participated in a beauty contest with the adversary of a new firm client. In other words, the firm's left hand not knowing what its right hand is doing is exacerbated at large firms — particularly those with multiple offices. Hence, having attorneys enter into a computerized conflicts system the prospective clients with whom they have consulted, helps identify potential conflicts before they arise.

Ideally, the best defense to a disqualification motion is an iron-clad waiver agreement obtained from the prospective client before the beauty contest. Although it may seem impractical to begin your sales pitch with "Dear prospective client, please be advised that any confidential information you share may later be used against you," the most effective insurance against future disqualification is to have the prospective client waive the potential future conflicts. CRPC 3-310(E).

Law firms should have boilerplate waiver agreements for prospective clients to sign before the beauty contest begins. While many attorneys are only focused on winning the beauty contest, the waiver agreement can act as a form of insurance — particularly against

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malicious litigants whose only focus is to secure future disqualification.

The contents of the waiver agreement, at the very least, should advise the prospective client that: (a) the meeting is merely preliminary and the prospective client will not disclose any confidential information; (b) if the attorney is not retained, any confidential information intentionally or inadvertently disclosed will not be protected and may be used in future litigation adverse to the prospective client; and (c) if the attorney is not retained, the prospective client waives the right to disqualify the attorney from representing any adverse party in the same or similar litigation.

Undoubtedly, some attorneys who request a prospective client to sign a waiver agreement will be at a disadvantage before the beauty contest begins. Accordingly, attorneys will have to make the wavier agreement more palatable by informing prospective clients that it is also a device designed to protect the prospective client. This can be accomplished by noting that the waiver agreement also safeguards the prospective client's confidential information by requesting that it not be disclosed unless or until the attorney is retained.

DESPITE THE INHERENT ETHICAL AND BUSINESS DEVELOPMENT DANGERS POSED BY BEAUTY CONTESTS, MANY ATTORNEYS STILL FAIL TO UNDERTAKE ANY PRECAUTIONARY MEASURES BEFORE ENTERING THEM.

While some prospective clients will reject your firm's participation in the beauty contest if you first demand a waiver agreement, the prospective client who is considering hiring you in good faith should be less likely to object to a waiver agreement. As a final good measure, the unsuccessful law firm beauty contestant who is later hired by an adversary must also disclose to the new client the firm's previous meeting with the other party. CRPC 3-310(B). Attorneys failing to make said disclosure can be exposed to both malpractice and disciplinary claims.

Attorneys uncomfortable with requesting a waiver agreement from prospective clients should at least verbally admonish the prospective client's not to share any confidential information unless and until they are retained. After the beauty contest, the attorney can send a thank-you letter to the prospective client that memorializes: (a) the verbal admonishments made before the meeting; and (b) that the attorney has learned no confidential information from the prospective client. Of course, confirming letters are not as effective as a waiver agreement.

It should be noted that waiver agreements have their limitations and may be declared invalid under certain circumstances. In this regard, attorneys should remember that the most important precaution one can take in a beauty contest is to avoid ever receiving any confidential information.

If an attorney actually receives confidential information from a prospective client, a waiver agreement will be deemed invalid. The rationale is that the waiver agreement lacks "informed consent" because the prospective client cannot consent to an actual breach of confidence. *Elliott v. McFarland Unified School Dist.*, 165 Cal. App. 3d 562, 573 (1985). Thus, a waiver agreement can only rebut the presumption that confidential information was shared during the beauty contest that bears a "substantial relationship" with the new representation.

Even if a law firm secures a valid waiver agreement, the law firm may still run afoul of the obligation not to represent a client when a "previous relationship would substantially affect the member's representation." CRPC 3-310(B)(2)(b). In this regard, an attorney's confidentiality duty to a former client may interfere with the new client's right to effective representation, not to mention expose the attorney to a potential malpractice claim.

Some law firms choose to erect the proverbial

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Chinese Wall around the tainted attorney as an effort to cure the conflict resulting from representation of a party adverse to a former client in substantially related litigation. However, courts have not readily accepted this as sufficient means to overcome disqualification. *Henriksen v. Great American Sav. & Loan,* 11 Cal. App. 4th 109, 114, (1992) (law firm vicariously disqualified notwithstanding ethical screening wall around attorney infected with former client's confidences).

Aside from waiver agreements, seasoned business developers rely on good discretion and common sense to avoid conflicts in beauty contests. However, business developers should take particular caution when entering beauty contests involving: (a) multiple opposing parties; (b) high-stakes litigation where both sides are consulting many firms; (c) unknown or cold-call prospective clients who will not sign a waiver agreement, but nonetheless wish to volunteer confidential information; (d) a prospective client that is adverse to a prized potential client your firm wishes to represent (e.g., prospective Doe vs. Fortune 100 company); or (e) a prospective client that you do not have a strong chance of acquiring.

When entering such contests, the primary goal (aside from winning) is to ensure that no confidential information is disclosed before retention, and more important, that this understanding is reduced to writing. Applying the forgoing efforts and discretion, law firms can better balance the risks of (a) choosing to receive confidential information from prospective clients in order to put on a good show at the contest, or (b) protecting the firm from future disqualification.

Sometimes law firms make the mistake of relaxing their conflict protection measures when a beauty contest manifests itself in unexpected forms. Tellingly, business developers should keep their guard up when participating in a prospective client's Request for Proposal ("RFP"), which is merely another form of the law firm beauty contest.

RFPs, like traditional beauty contests, can also be fraught with peril. The prospective client at certain phases of the RFP evaluation may disclose confidential information for your firm to consider. Moreover, unsuccessful participation in the RFP can disqualify participating attorneys from representing new clients adverse to the company that issued the RFP. Law firms should therefore consider circulating a waiver agreement before responding to the RFP.

Despite the inherent ethical and business development dangers posed by beauty contests, many attorneys still fail to undertake any precautionary measures before entering them. Perhaps these attorneys are only focused on winning the beauty contest, and not on protecting against the theoretical risk of being disqualified in the future. However, in an era of eroding client loyalty, cost-conscious clients, and clients desiring legal specialists, beauty contests are becoming more common, as is the risk of future disqualification.

Remember that your former client that never hired you may: (a) disqualify you from representing the adverse parties in the same litigation; and (b) conflict you out from representing a host of future potential clients who are adverse to your short-lived former client in substantially related matters.

It might appear that the beauty contest is powerful weaponry for the prospective client or in-house counsel who wishes to disqualify the best law firms in town from representing their adversaries. This is a dangerous tactic for prospective clients to employ, however, because if the participating law firm is not disqualified, then the prospective client's case may be compromised by the adversary's attorney's knowledge of disclosed confidences. One court noted this reality: "disqualifying all the lawyers interviewed by a company for prospective employment would itself undermine the public's confidence in the judicial process." *Goodrich,* 638 F. Supp. at 1054.

It behooves both the prospective clients and the attorneys who participate in beauty contests to avoid discussing confidential information during initial consultations, and to reduce this understanding to an agreement. The attorneys who do employ scrupulous protection measures before entering beauty contests are far less likely to face the prospect of losing twice: i.e., the beauty contest and the subsequent new client.

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QUESTIONS: ATTORNEY-CLIENT PRIVILEGE

MCLE ETHICS

1) One meeting with a potential client that discloses confidential information (but never retains you) can prevent you from later representing an adverse party on the same matter.

True **False**

2) One meeting with a potential client that discloses confidential information (but never retains you) can prevent you from later representing an adverse party on a difference matter?.

True **False**

3) An attorney's duty to a former potential client that disclosed confidential information (but never retained you) lasts forever.

True **False**

4) Participation in a "beauty contest" where the potential client discloses confidential information (but never retains you) prevent you from later representing an adverse party on the same matter.

True **False**

5) A one hour conversation with a potential client that discloses confidential information (but never retains you) prevents you from later representing an adverse party on the same matter.

True **False**

6) A potential conflict with a former potential client can be cured by the attorney providing written notice.

True **False**

7) A potential conflict with a former potential client can be cured by the attorney obtaining written consent.

True **False**

8) Disqualification is mandatory where a former potential client demonstrates a "substantial relationship" between their matter and your new client matter.

True **False**

9) A waiver agreement signed by a potential client, before any confidences are disclosed, prevents the potential client from challenging your subsequent representation of adverse parties.

True **False**

10) One possible protective measure against disqualification by a former client who ends up never hiring you is to have him or her agree in writing that the meeting is preliminary and that confidential information should not be disclosed.

True **False**

11) A potential client would never be regarded as a "former" client.

True **False**

12) There may be reason to add a potential client's name to your conflict check system even if that potential client ends up not hiring your firm after all and thus, never becomes an actual client.

True **False**

13) There has never been a case where a court refused to disqualify an attorney who was given information by the potential client that disclosed their trial strategy and strengths and weaknesses.

True **False**

14) During a beauty contest, most courts would consider a disclosure by a potential client of his or her trial strategy and the strengths and weaknesses of his or her case to be "confidential" information.

True **False**

15) The reasoning behind prohibiting an attorney from representing a party adverse to a former client, even when the "former" client ended up not hiring the attorney, is to protect confidences disclosed by the former client.

True **False**

16) After losing a beauty contest, the attorney cannot represent the adverse party if there is a "substantial relationship" between the current and former matters.

True **False**

17) A potential client would not use the beauty contest as a tactic to disqualify numerous attorneys from representing adverse parties.

True **False**

18) It is often difficult to have a meaningful initial consultation with a potential client if the client fails to disclose confidential information; nevertheless, to avoid disqualification in the future, you must adhere to this rule.

True **False**

19) Once a former client (who never hired your firm) shows a "substantial relationship," between his matter and the current matter, there is a presumption that confidential information was given by the former client.

True **False**

20) The mere appearance of impropriety will automatically disqualify an attorney in California.

True **False**

THE MAVEN SPEAKS FRANKLY ABOUT ETHICS AND SEX

By Carol M. Langford

Carol M. Langford

MCLE ETHICS

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Greetings from the Law Office of Carol M. Langford, a.k.a. The Fabulous Maven! Have you missed me dolls? Well, I've missed you too, but I've been busy as the proverbial bee trolling the San Francisco waters looking for a good looking, bright, heterosexual man. Even for The Maven, this has not been an easy task. I started my fishing expedition by placing an ad in the San Francisco Chronicle. Any port in a storm, I always say! It proved quickly to be an unfortunate choice. I caught every fish in the sea from flounders to bottom feeders, including an inmate from Vacaville prison looking for a pen pal, a foreign national seeking a quick marriage, an odd set of twins and a date who appeared to be an extraterrestrial. The Maven gave up in disgust and has resorted to cruising sports bars on game Sundays with her other single friends.

Apparently other lawyers are faring much better than The Maven in the love stakes. I heard a story the other day about someone who met his dream girl at a client's party. She's gorgeous, smart, and the vice-president of the client's company. How romantic! How exciting! How horrible if the relationship goes south! "Horrible, but not unethical" you say to The Maven, a bit smugly.

Well, before you start gettin' freaky with your client Mr. Priss Pants, allow Mistress Maven to point out some sexual pitfalls. First, pull out your ethics codebook (you know, the one that's all dusty) and take a gander at Rule 3-120. Do it now, you nasty freakmeister! While the Rule does not expressly prohibit sexual congress between consenting adults, it does state that you can't force a client to horizontal mambo with you, and you can't act incompetently as a result of having a relationship with your client. Ongoing consensual relationships that pre-date the attorney-client relationship, and marital relationships are excepted from this Rule. Bottom line: if she hasn't begged to see you shake that thang big boy, then she's probably happier just to watch Frasier and eat some Chinese take-out.

"But lawyers don't really get into trouble under this Rule, do they?" you challenge Mistress Maven. Oh, but they do. Now lick my boots, and bend over for a little spanky! And then ask John G. in the *Barbara A. vs. John G.* (1983) 145 Cal.App.3d 369 case about trouble. Mr. G. made a big mistake by telling Barbara that he "couldn't possibly get anyone pregnant—I'm sterile!" Isn't that a bit like a man saying "Of course I'll respect you in the morning?" Well, she believed him and after suffering an ectopic pregnancy she sued and won a substantial sum of money from his carrier. Add to that the acute shame of a public sex suit, and John G., I'm sure, will keep his drawers on from now on.

But there's more, readers. Business & Professions Code section 6106.9 defines sexual relations to include "the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse." That's pretty broad, and probably includes The Maven's demand that all male clients submit to a full body massage at The Maven's other business: The Maven's Massage and Recreation Club. Ahem. Well, enough said.

With all the trouble that sex can cause, why not just put an all-out ban on sexual relations with a client? Good question, you sexy old thing. The answer lies in our California state constitution. Our constitution has an express right of privacy enumerated within it that would make any such Rule unconstitutional. Not to mention the right of association on the federal level. But the truth is, if you have sex with a client, especially in a family law matter, you are asking for the State Bar to have you for breakfast, and for The Maven to get her whip out.

Carol Langford practices law in Walnut Creek in the law firm of Langford & Bell, LLP. She specializes in attorney conduct, ethics and legal malpractice. You can call her at (925) 938-3870 or email her at langford@usfca.edu.

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QUESTIONS: SEXUAL RELATIONS BETWEEN ATTORNEY AND CLIENT

MCLE ETHICS

1. Having sex with a client is great fun and strongly recommended by the State Bar.
True **False**

2. If an attorney does not expressly condition the performance of legal services on a client's willingness to engage in sexual relations then a violation of 6106.9 has not occurred.
True **False**

3. All attorneys in a firm are disqualified from engaging in sexual relations with a client even if they are not engaged in the direct representation of the client.
True **False**

4. For the purposes of 6106.9, "sexual relations" means sexual intercourse and not the mere touching of an intimate part of another person for the purpose of sexual arousal.
True **False**

5. According to 6106.9, an attorney cannot continue to represent a spouse if, as a result of their sexual relationship, the attorney is no longer able to competently represent their spouse in accordance with Rule 3-110 of the Rules of Professional Conduct of the State Bar of California.
True **False**

6. It is okay for an attorney to employ coercion in entering into a sexual relationship with a client so long as the attorney does not do so through intimidation or the use of undue influence.
True **False**

7. An attorney can impliedly condition the performance of legal services upon the client's willingness to engage in sexual relations so long as the client is only a prospective client, and not a current or former client.
True **False**

8. An attorney can continue representation of a client with whom the attorney has sexual relations even if the sexual relations could cause the attorney to perform legal services incompetently, so long as the attorney receives approval by a State Bar or Superior Court judge.
True **False**

9. The performance of legal services can be conditioned on the client's willingness to engage in sexual relations if the client expressly consents in writing and is given an opportunity to confer with outside counsel.
True **False**

10. Complaints made to the State Bar of a violation of this section need not be verified under oath unless the complainant is a current client.
True **False**

11. An attorney cannot continue sexual relations with a client if the sexual relations would, or would be likely to, damage or prejudice the client's case.
True **False**

12. This statute does not govern the sexual relations between attorneys and their spouses.
True **False**

13. Juliet, a prospective client, walks into the office of Counselor Romeo. Before Juliet speaks a word, Romeo propositions here with one of the lesser known gems of romantic innuendo, requesting that she stop her grinnin' and drop her linen. Juliet willingly complies. A few minutes later, Juliet introduces herself and her particular legal problem. Romeo agrees to assist her if she will continue having sexual relations with him. Juliet signs a fee agreement. Counselor Romeo has not violated any part of 6106.9.
True **False**

14. In the event that the attorney is a minor, 6106.9 does not apply to sexual relations between the attorney and her client.
True **False**

15. John, a former client, asks Beatrix, his former attorney, for his files. Beatrix implies that she will not return his files unless John consents to sexual relations with her. Beatrix has violated 6106.9.
True **False**

16. If a client later willingly consents to sexual relations, any prior attempts by the attorney to condition the performance of legal services on the client's willingness to engage in sexual relations with the attorney are excused.
True **False**

17. 6106.9 does not govern sexual relations between attorneys and prospective clients, only current clients.
True **False**

18. For a violation of 6106.9 to occur, the client must establish that the attorney's conduct resulted in physical conduct.
True **False**

19. An attorney can initiate sexual relations with a client if he does not condition the performance of legal services on the client's willingness to engage in the sexual relations, if he does not employ coercion, intimidation, or undue influence in entering into the sexual relations with the client, if the sexual relations will not cause the attorney to perform legal services incompetently, and if the sexual relations would not damage or prejudice, or be likely to damage or prejudice the client's case.
True **False**

20. If the initiation of the attorney-client relationship occurs outside of the attorney's office or firm it is not a violation of 6106.9.
True **False**

CLIENT FILE RETENTION AND ETHICS

By Ernest Schaal

Ernest Schaal

MCLE ETHICS

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Rule 3-500. Communication: Rule 3-500 states that a member shall keep a client reasonably informed about significant developments relating to employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

In the discussion of Rule 3-500 is the statement that this rule is not intended to apply to any document or correspondence that is subject to a protective order or non-disclosure agreement, or to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the member.

A member may contract with the client in their employment agreement that the client assumes responsibility for the cost of copying significant documents. But, according to San Diego County Bar Association Formal Opinion No. 2001-1, an attorney may not condition delivery of copies of significant documents in the client's files to the client on the client's prior payment of the copying expense, regardless of a provision in the fee agreement to the contrary. According to Formal Opinion No. 2001-1, the attorney's recourse is to recover the copying charges after the representation terminates if the fee agreement authorizes them and the client fails to pay them.

Rule 3-700. Termination of Employment: Rule 3-500 covers communication during the employment, but what happens after termination of that employment? That is covered in Rule 3-700 (D) (1), which states that a member whose employment has terminated shall, subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not.

The discussion of Rule 3-700 (D) (1) makes clear the member's duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. The rule codifies existing case law.

The discussion of Rule 3-700 (D) (1) also states that the rule is not intended to prohibit a member from making and retaining, at the member's own expense, copies of papers released to the client.

Work Product: Not mentioned in the discussion of Rule 3-700 (D) (1) is whether or not "client papers and property" includes documents that constitute or represent the attorney's impressions, conclusions, opinions, legal research and theories. According to Formal Opinion No. 1984-3 of the San Diego County Bar Association, which was written prior to Rule 3-700 (D) (1), they would not. That opinion stated that, "pursuant to statutory and decisional law, the client is not 'entitled' to any papers or property which constitute or reflect an attorney's impressions, opinions, legal research or theories as defined by the 'absolute' work product privilege of the Code of Civil Procedure section 2016, subdivision (b). Although disclosure of the attorney's work product is not obligated, such disclosure is recommended as a matter of professional ethics and courtesy."

File Retention: The issues of what ethical duties an attorney has regarding the retention of former clients' files and whether an attorney is ethically required to retain the files for any specific length of time following the

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completion of representation are discussed in Formal Opinion No. 2001-157 of the State Bar of California Standing Committee of Professional Responsibility and Conduct. The results of that opinion are:

> "As to original papers and other property received from a former client, including estate planning and other signed, original documents delivered under Probate Code section 710, the attorney's duties are governed by the law relating to deposits (bailments) or by the Probate Code. With respect to other 'client papers and property' to which the former client is entitled under rule 3-700, absent a previous agreement, the attorney has an obligation to make reasonable efforts to obtain the former client's consent to any disposition that would prevent the former client's taking possession of the items. If, after reasonable efforts, the attorney is unable to locate the former client or obtain instructions, the attorney may destroy the items unless he or she has reason to believe (1) that preservation of the items is required by law, or (2) that destruction of the items would cause prejudice to the client, i.e., that the items are reasonably necessary to the client's legal representation. Since the 'client papers and property' to which the former client is entitled may include a variety of items, the attorney may have an obligation to examine the file contents before the file is destroyed. No specific time period for retention of a particular item can be specified. Files in criminal matters should not be destroyed without the former client's consent while the former client is alive."

According to that formal opinion, the basic principle is that the attorney may destroy a particular item from a former client's file if he or she has no reason to believe that the item will be reasonably necessary to the client's representation, i.e., that the item is or will be reasonably necessary to the former client to establish a right or a defense to a claim.

That formal opinion states that, where an item has no intrinsic value, but the attorney fears that loss of the item will injure the former client, the item should be retained or the information contained therein preserved by microfilming or similar means. But the opinion warns that not all recording by electronic means will suffice to protect the client from reasonably foreseeable prejudice. Not all devices used to reproduce records accurately reproduce the originals in all details without permitting additions, deletions, or changes to the original document images.

Attorney trust account record retention is handled separately and is governed by Rule 4-100(B)(3), which requires that the trust account records be kept for a period of no less than five years after final appropriate distribution of such funds or properties.

Means of destruction: Business & Professions Code Subsection 6068 (e) states that one of the duties of the attorney is "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." That subsection applies to the storage, handling, and ultimate disposition of the files and papers of former clients. Accordingly, the attorney is obliged to use a method of destruction that will ensure no breach of confidentiality. Likewise, attorneys that dispose of client files stored in electronic form (e.g., tapes, floppy disks, hard drives) must exercise care to use a method of destruction that will ensure no breach of confidentiality.

Practice Tips: One practice tip from Formal Opinion No. 2001-157 is that attorneys handling discrete matters such as claims or litigation might consider including in their written fee agreements a provision that, following termination of the representation, the contents of the file may be destroyed without review at the end of a specified and reasonable period of time, unless the client has requested delivery of the files to the client. Such agreement would not be appropriate in all circumstances: for example, it would be inappropriate if the attorney were being retained to write a will or hold documents for safekeeping under the Probate Code or Civil Code.

Another practice tip from the opinion is that, because of the attorney's deposit obligations with respect to original client papers, among other reasons, some attorneys' office policies and practices discourage retention of original client records and urge instead that accurate copies be made promptly and the originals returned to the client so that the client has responsibility for retention.

Ernest Schaal is a patent attorney working in Gifu Japan.

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QUESTIONS: CLIENT FILE RETENTION AND ETHICS

MCLE ETHICS

1. An attorney must comply with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

True **False**

2. An attorney may not condition delivery of copies of significant documents in the client's files to the client on the client's prior payment of the copying expense, regardless of a provision in the fee agreement to the contrary.

True **False**

3. Whenever an attorney's employment has terminated, the attorney shall promptly release to the client all client papers and property, at the request of the client, regardless of any protective order or non-disclosure agreement.

True **False**

4. "Client papers and property" includes correspondence and pleadings, but does not include things like deposition transcripts, exhibits, physical evidence, and expert's reports.

True **False**

5. "Client papers and property" is determined independent of whether the client has paid for them.

True **False**

6. Rule 3-700 (D) (1) codifies existing case law.

True **False**

7. Rule 3-700 (D) (1) is not intended to prohibit a member from making, and retaining, at the member's own expense, copies of papers released to the client.

True **False**

8. According to San Diego County Bar Association Formal Opinion No. 1984-3, disclosure of the attorney's work product is not required and should not be made.

True **False**

9. As to original papers and other property received from a former client, including estate planning and other signed, original documents delivered under Probate Code section 710, the attorney's duties are governed by the law relating to deposits (bailments) or by the Probate Code.

True **False**

10. With respect to 'client papers and property,' to which the former client is entitled under rule 3-700, other than original papers and other property received from a former client and absent a previous agreement, the attorney has an obligation to make reasonable efforts to obtain the former client's consent to any disposition that would prevent the former client's taking possession of the items.

True **False**

11. If, after reasonable efforts, the attorney is unable to locate the former client or obtain instructions, the attorney may destroy the items, other than original papers and other property received from a former client, unless he or she has reason to believe (1) that preservation of the items is required by law, or (2) that destruction of the items would cause prejudice to the client, i.e., that the items are reasonably necessary to the client's legal representation.

True **False**

12. The attorney may have an obligation to examine the file contents before the file is destroyed.

True **False**

13. The minimum time period for retention of documents is statutory set at five years.

True **False**

14. Trust account records must be kept for a period of no less than five years after final appropriate distribution of such funds or properties.

True **False**

15. Files in criminal matters are treated the same way as files in civil matters.

True **False**

16. A basic principle is that the attorney may destroy a particular item from a former client's file if he or she has no reason to believe that the item will be reasonably necessary to the client's representation.

True **False**

17. Where an item has no intrinsic value, but the attorney fears that loss of the item will injure the former client, the item should be retained or the information contained therein preserved by microfilming or by any recording by electronic means.

True **False**

18. In destroying files stored on floppy disks or other recording medium, dumping the medium in the trash is sufficient.

True **False**

19. One recommendation is that all written fee agreements should contain a provision that following termination of the representation the contents of the file may be destroyed without review at the end of a specified and reasonable period of time, unless the client has requested delivery of the files to the client.

True **False**

20. Some attorneys' office policies and practices discourage retention of original client records and urge instead that accurate copies be made promptly and the originals returned to the client so that the client has responsibility for retention.

True **False**

LEGAL ETHICS AND YOUR SUPPORT STAFF

By Deanna A. Pepe

Deanna A. Pepe

MCLE ETHICS

After reading this article, you can earn MCLE credit by completing the test on page 23

The California Rules of Professional Conduct apply to lawyers, not non-lawyers. State disciplinary bodies charged with overseeing lawyers cannot directly discipline legal support staff for unethical conduct. However, they can discipline the attorney who has supervisory control over support staff for that individual's conduct.

Therefore, it is essential that the attorney set up the ethical standards to be followed in the law office. The following are some of the things you should discuss with your support staff.

1. Act for the Lawyer, Not as the Lawyer. When you hire your support staff, establish parameters for those who will be working with you. Your staff's conduct must be compatible with your professional obligations. Discuss with your secretary the difference between "being helpful to the client" and "practicing law without a license." Your secretary may have more experience than you do. A competent legal secretary is one of your most important tools in the practice of law. But you are the attorney. Your professional judgment and abilities relate the general body and philosophy of law to a specific legal problem of a client.

With your permission, your secretary may be able to tell a client what has been happening in the case, but to say what procedures or actions you will be taking next crosses the line. A legal secretary cannot give legal advice.

2. Loose lips sink ships. Legal matters should never be discussed outside the office or with persons not involved in the legal matter. A lawyer "must maintain inviolate the confidence and at every peril to himself or herself preserve client secrets," and must emphasize the importance of confidentiality to the legal support staff. Such protected information includes the client's identity, the client's whereabouts and fee arrangements, among other things.

TO ASSURE ABSOLUTE CONFIDENTIALITY TO YOUR CLIENTS AND MALPRACTICE CARRIER, DO NOT SHARE SUPPORT STAFF, FILING CABINETS OR NETWORKED COMPUTERS.

Confidentiality is especially important when using a shared space/shared support staff arrangement. When considering any form of shared space, carefully protect the confidentiality of your client's records. Discuss with the shared support staff the importance of your clients' confidentiality and what you expect of them with respect to the handling of your clients' information.

Most errors and omissions insurance carriers carefully examine any shared space arrangements, particularly when the names of attorneys in separate practices are listed together on signs, letterhead or other marketing efforts. To assure absolute confidentiality to your clients and malpractice carrier, do not share

support staff, filing cabinets or networked computers.

3. Those little white lies. Legal secretaries routinely face a wide range of moral dilemmas. Should he tell the client that you are out of the office when you are really sitting at your desk? A white lie, you say. What is the difference between that and asking your secretary to backdate a proof of service? As secretaries, our loyalty is to our client and our attorneys. Many secretaries feel it is almost impossible to keep the activities of the client and the attorney confidential without lying.

Suggest instead a rephrasing: "she's unavailable" instead of "she's not in the office." And, don't put your support staff in the position of committing perjury by falsifying a proof of service or, if he is a notary public, notarizing documents without the signor being present.

4. Signing the Attorney's Name. Discuss with your secretary when and how he can sign her name to letters and when and how he can sign your name to them. Set up a standard block for him to use. "Jones, Jones & Smith by Jim Brown, Legal Secretary to Mary Jones" is acceptable. "Jones, Jones & Smith by Jim Brown" is not. The latter gives the impression that Jane Brown is part of a member of the firm. When your secretary signs "Mary Jones," he should also include his initials and the notation "dictated but not read" should appear in the letter. It is now possible, as a result of technology, to standardize the signature blocks on letters so that the font changes and a "sent before review in order to avoid delay" or "dictated but not read" may be inserted in the signature space so no ink signature is necessary.

Pleadings cannot be signed by your secretary. And you would never ask him to sign your name to your declaration.

5. Referring to your legal secretary as a "legal assistant." As of January 1, 2001, Business and Professions Code section 6450 et seq. has changed the definition of the term "paralegal" and outlined new qualifications. Under section 6454, the term "legal assistant" (along with "attorney assistant," "freelance paralegal," "independent paralegal," and "contract paralegal") is now synonymous with "paralegal" and, under section 6450(a), a paralegal must be qualified under certain education, training or work experience. Under the code, a paralegal is subject to the same duty as an attorney to "maintain inviolate the confidentiality, and at every peril to himself or herself to preserve the attorney-client privilege."

A PARALEGAL IS SUBJECT TO THE SAME DUTY AS AN ATTORNEY TO "MAINTAIN INVIOLATE THE CONFIDENTIALITY, AND AT EVERY PERIL TO HIMSELF OR HERSELF TO PRESERVE THE ATTORNEY-CLIENT PRIVILEGE."

In addition, all paralegals are required to certify completion of mandatory continuing legal education, including four hours of mandatory continuance legal education in legal ethics every three years and four hours of mandatory continuing education in either general or in a specialized area of law every two years. As a paralegal or legal assistant's supervising attorney, you must certify these continuing education requirements.

Under section 6452 of the Business and Professions Code, it is unlawful for a person to identify himself or herself as a paralegal ("legal assistant") unless he or she has met the educational and employment qualifications and unless your legal secretary meets these qualifications, he or she cannot be referred to as a "legal assistant."

Any person who violates the provisions of section 6451 or 6452 of the Business and Professions Code is guilty of an infraction for the first violation, which is punishable upon conviction by a fine of up to $2,500 and is guilt of a misdemeanor for the second and each subsequent violation, which is punishable upon conviction by a fine of $2,500 or imprisonment in a county jail.

6. Handling client funds. Your office staff must understand the Rules of Professional Conduct with

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respect to funds received or held for the benefit of your clients. If your secretary is also handling the accounting duties, discuss Rule 4-100 of the California Rules of Professional Conduct with her and follow the standards set by the Board of Governors of the State Bar with respect to trust account record keeping.

Set up an ethics program in your office and provide rules for formulating business objectives, making decisions and determining appropriate and inappropriate behavior throughout your firm. Set up an office email policy and teach your staff how to send effective emails so you can maintain the professionalism of your practice and monitor the communication for appropriateness.

Members of Legal Secretaries, Incorporated (California) agree to be bound by the LSI Code of Ethics which states as follows:

> It shall be the duty of each member of Legal Secretaries, Incorporated to observe all laws, rules and regulations, now or hereafter in effect relating to confidentiality and privileged communication, acting with loyalty, integrity, competence and diplomacy, in accordance with the highest standards of professional conduct.

Support your employees' membership and involvement in a professional association such as Legal Secretaries, Incorporated (California). By investing in your employees, you invest in your firm. By supporting your employees' involvement in a professional association, you foster a positive working relationship.

Continuing education helps everyone. LSI offers many hours of continuing education through its legal specialization sections (Civil Litigation, Criminal Law, Family Law, Law Office Administration, Probate/Estate Planning, and Transactional).

LSI sponsors the "California Certified Legal Secretary" proficiency examination for California legal secretaries. The test challenges a legal secretary's skills and knowledge in California legal procedures, legal terminology, law office administration, the ability to communicate effectively, reasoning and ethics.

Deanna A. Pepe, CCLS, PLS, is a past president of Legal Secretaries, Incorporated (California) a statewide organization promoting the career of the legal secretary and providing educational, professional and personal development programs for its members and law office support staff. She currently serves as LSI's Special Advisor to the Law Practice Management & Technology Section. She earned her California Certified Legal Secretary designation in 1989 and her Certified Professional Legal Secretary designation in 1992.

For more information regarding
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MCLE CREDIT

HOW TO RECEIVE MCLE CREDIT

After reading the MCLE credit article, complete the following test to receive 1.00 hours of MCLE credit

• Answer the test questions on the form below. Each question has only one answer. • Mail form and a $20 processing fee **(No fee for LPMT Members)** to: LPMT Section, State Bar of California, 180 Howard Street, San Francisco, CA 94105-1639 • Make checks payable to LPMT

• Correct answers and a CLE certificate will be mailed to you within eight weeks.

NAME EMAIL FAX

STATE BAR NUMBER LAWFIRM/ORGANIZATION

ADDRESS/STATE/ZIP

CERTIFICATION: The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education. This activity has been approved for the minimum continuing education credit by the State Bar of California in the amount of 1.00 hour which will apply to Legal Ethics Credit.

QUESTIONS: LEGAL ETHICS AND YOUR SUPPORT STAFF

MCLE ETHICS

1. While the attorney is the one who will be sued for professional liability claims and must answer for all that goes on in the firm and all that it produces, the support staff plays a vital role in doing the work that prevents conditions from arising that may lead to claims.
True **False**

2. It is acceptable for the attorney to share legal fees with his or her legal secretary.
True **False**

3. If your legal secretary meets the educational or employment requirements of Business and Professions Code section 6450, he or she can be referred to as a "legal assistant."
True **False**

4. It is the responsibility of the attorney supervising a paralegal to certify the paralegal's completion of his or her MCLE requirements.
True **False**

5. As long as your secretary reads your declaration to you over the phone, it is appropriate for her to sign your name to the document.
True **False**

6. Paralegals and legal assistants who perform "paralegal duties" as defined in Business and Professions Code section 6455 but are not in compliance with the educational or employment requirements of sections 6451 and 6452 can be fined up to $2,500 for their first infraction.
True **False**

7. As long as you approve, it is acceptable for your notary public secretary to notarize your client's signature without your client being present.
True **False**

8. Your paralegals do not need to hold client information as confidential as you do.
True **False**

9. As a "legal assistant," your legal secretary is required to meet the MCLE requirements set forth in the Business and Professions Code.
True **False**

10. If your legal secretary has at least 15 years' experience, it is permissible for her to meet with the clients and discuss what actions will be taken on their cases.
True **False**

11. It is a good idea to look around at your reception area and other areas in your firm that clients and other visitors see regularly to ensure that confidential material cannot be viewed by others.
True **False**

12. All paralegals are required to certify completion every three years of four hours of minimum continuing legal education in legal ethics.
True **False**

13. You should sit down with your law office support staff on a periodic basis to discuss firm policies, ethical considerations, confidentiality expectations and working with the client.
True **False**

14. Business and Professions Code section 6454 allows for law office staff who do not meet the minimum requirements to be referred to as a paralegal to still perform "paralegal" duties if they at least hold the title of "legal assistant" or "attorney assistant."
True **False**

15. When considering a shared office space arrangements, it is critical that the confidentiality of your client's records are protected and shared support staff are property trained in client confidentiality.
True **False**

16. In addition to the legal ethics MCLE requirement for paralegals, section 6450 of the Business and Professions Code also requires that an additional four hours of general or specialized law MCLE credit every two years be earned by the paralegal or legal assistant.
True **False**

17. The terms "paralegal," "legal assistant," "attorney assistant," "freelance paralegal," "independent paralegal," and "contract paralegal" are synonymous for the purposes of the educational and employment requirements of the Business and Professions Code.
True **False**

18. It is a good idea to have a clearly stated written firm policy concerning the acceptable use of email.
True **False**

19. Your secretary is subject to disciplinary action by the State Bar if he or she mishandles client funds.
True **False**

20. Subsequent violations of the educational and employment requirements or the limitations on the type of work a paralegal or legal assistant may perform under sections 6451 and 6452 of the Business and Professions Code are punishable by fine and/or imprisonment.
True **False**

ELIMINATION OF BIAS CONTINUED FROM PAGE 3

activities of attorneys who have been under-represented, such as attorneys who are women, ethnic minorities, gay, lesbian, transgender or bisexual, attorneys with disabilities, and senior lawyers. Nothing is said in its description about eliminating bias. There is a big difference between under-representation of a protected group and elimination of bias against that group. The two goals may be related, but they are not the same things.

A review of the State Bar's section executive committees, special committees, boards, and commissions shows that none of them seem to have as their goal addressing the problem of elimination of bias in the legal profession.

In dicta in a dissenting opinion of Warden v. State Bar (1999) 21 Cal.4th 628, 88 Cal.Rptr.2d 283; 982 P.2d 154, J. Kennard stated that "Instruction in eliminating bias from the legal profession may make attorneys more aware of such biases and assist in eliminating them." That may be true, but it is unclear whether mandatory instruction would be able to eliminate that bias all by itself.

Ernest Schaal is a patent attorney working in Gifu Japan.